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IN THE

Supreme Court of the United States

October Term, 1966
No. 708

SPINDLER REALTY CORPORATION, a corporation,
Petitioner and Appellant,

vs.

JOHN C. MONNING, as General Manager and Superintendent of Building and Safety of the City of Los Angeles,
Respondent and Appellee.

SPINDLER REALTY CORPORATION,
Plaintiff,

vs.

CITY OF LOS ANGELES,
Defendant and Respondent.

Petition for Writ of Certiorari to the District Court of Appeal, Second Appellant District, of the State of California.

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SPINDLER REALTY CORPORATION,
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CITY OF LOS ANGELES,
Defendant and Respondent.

Petition for Writ of Certiorari to the District Court of Appeal, Second Appellant District, of the State of California.

Petitioner, Spindler Realty Corporation, prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal, Second Appellate District, of the State of California entered in the above case on June 29, 1966 and modified on July 27, 1966.

Opinions Below.

The Amended Opinion of the District Court of Appeal, Second Appellate District, of the State of California is reported at 243 A.C.A. (Calif.) 260.

Jurisdiction.

The judgment of the District Court of Appeal, Second Appellate District, of the State of California was made and entered on June 29, 1966. On July 27, 1966, an Order was filed denying a Petition for Rehearing and modifying the Opinion filed on June 29, 1963. A Petition for Hearing in the Supreme Court of the State of California was denied on August 24, 1966. Copies of the Opinion and Order of the District Court of Appeal are annexed to this Petition as Appendix "A" and Appendix "B" respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

The questions presented are:

1. Whether, under the circumstances disclosed by this record, Petitioner acquired a *vested right to build* for R-5 (multiple housing) purposes, of which it cannot constitutionally (*i.e.*, under the 14th and 5th Amendments) be deprived.

2. Whether if, as found by the Trial Court, petitioner obtained a *"vested right to grade" an R-5* homesite, the City of Los Angeles can constitutionally prevent petitioner from *building* on it.

3. Whether a vested right to build is determined by considerations of fairness, equity and good faith, both on the part of the developer, and the City, or whether consideration of any of these factors is foreclosed by the absence of a building permit.[1]

4. Whether a City Ordinance which places petitioner's property in a zone in which

   (a) the number of dwelling units per acre authorized by that zoning cannot *physically* be created, on the property and

   (b) the density requirements (*i.e.*, the authorized number of dwelling units per acre) made applicable to petitioner's property are not applicable to any other property, in the City, in that zone

   is arbitrary and discriminatory.

5. Whether elemental principles of justice and morality can create an estoppel against the City.

Constitutional Provisions and Statutes Involved.

The pertinent portions of the Fourteenth and Fifth Amendments of the Constitution of the United States, of Sections 12.03, 12.12, 12.23c of the Los Angeles Municipal Code and of Los Angeles City Ordinances Nos. 121338 and 116389 are set forth in Appendix "D".

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[1]The same considerations would determine whether Petitioner has also a valid "non-conforming use" under the provisions of Section 12.23C of the Los Angeles Municipal Code. *County of San Diego v. McClurken*, 37 Cal. 2d 683, 691. In the interest of brevity, the point is not argued here but is exstensively discussed at p. 75 *et seq.* of the Petition for Hearing.

Statement.

The basic facts are not in dispute[2] and are summarized as follows:

After the petitioner had spent the sum of $522,541.55 to grade and otherwise develop its real property for multiple housing (Zone R-5) purposes, the City of Los Angeles re-zoned the property to limit its use to single family dwellings (Zone R-1H). Petitioner had been induced to make these expenditures by reason of a long series of City permits and like authorizations, including a *grading permit*. An application for a *building permit* was filed, together with building plans, before the enactment of the rezoning statute. As proceedings to rezone were pending, a building permit was never granted. The Trial Court found that petitioner had a "vested right" to complete the *grading* of the building site for an R-5 purpose. But the District Court held that, once graded, petitioner could not *build* on it for that purpose.

The real property consisted of 21.4 acres. It had been zoned initially R-5, on petitioner's application and had remained so zoned for thirteen years. This zoning permitted the development of the property for either hotel or apartment house purposes and, during this period, petitioner secured a dozen authorizations and per-

[2]They are included in Findings 1 to 41 of the Finding of Fact, which are printed for convenient reference in the Appendix to Appellant's Opening Brief, which has been certified to this Court. Also certified, in addition to the Reporter's Transcript [Rep. Tr.] and Clerk's Transcript [Cl. Tr.] are the Briefs of both parties, the Petitions for Hearing and Rehearing and the Exhibits referred to in this Petition. That the facts generally were found in favor of the Petitioner appears from the fact that for the purpose of arguing its Motion for a New and Different Judgment in the Trial Court [Clk. Tr. p. 190], petitioner did not ask that the facts, as found, be supplemented or changed in any way.

mits from the City to develop the property for multiple housing uses.[3]

On July 19, 1961, petitioner filed its grading plans, paid its fees, and applied for a grading permit. This was over three months before any proceedings were instituted by the City looking toward a possible rezoning of the property. On September 27, 1961 the City granted a grading permit and petitioner filed a $275,000.00 bond conditioned on the faithful performance of the conditions of the permit. On October 18, 1961 petitioner entered into a contract with a grading contractor which provided a total liability of $562,796.00 [Find. 15].

On October 26, 1961, during the progress of the grading, and without notice to petitioner, the City Planning Commission initiated action to rezone the property. At that time, the grading operations had reached a point where it would have been "highly dangerous" in the event of rainfall to have done nothing for the protection of property owners below the grading operations [Find. 21]. "Huge amounts" of fill had been deposited on the ground from previous grading operations and "huge amounts" had been loosened and much brush had been cleared (*Ibid.*). The Trial Court found that on that day, petitioner had "every reasonable hope and expectation" that the proposed zoning of the subject property from R-5 to R-1H would not eventually become the law and that petitioner's decision to proceed with the grading was an "entirely reasonable" one to make (*Ibid.*). Petitioner's good faith in proceeding with the grading after such notice is not questioned by the City.[4] Notwithstanding, the District

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[3]These are listed at page 8 *et seq.* of this Petition.

[4]See Respondent's Answer to Petition for Hearing in the Supreme Court page 14.

Court held that expenditures made by petitioner, after such notice, totaling $305,287.12 (Appendix "A" p. 6), were made at its own "risk" (Appendix "A" p. 11).

Petitioner continued to grade the property until the enactment of the rezoning statute. At that time, the property had been placed in a safe condition (by raising the fill to a point where water did not drain off on homesites below). The work was then stopped, with the job somewhat less than half completed. It has remained in the condition shown by Exhibit 32G (reproduced in Appendix "F") ever since.

The density (or number of dwelling units authorized) for property zoned R-1H was 2½ units per acre (Appendix *"E"*). The density authorized for petitioner's property was twice that, or 5 units per acre (*Ibid.*). As each dwelling unit in zone R-1H was required, by Ordinance, to contain a minimum of 15,000 square feet, five (5) dwelling units could not be constructed on petitioner's property. *No other property in the City with this authorized density, was placed in Zone R-1H.*

The statute was not a general zoning ordinance of broad application but was "spot" zoning applicable to petitioner's property only.[5]

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[5]The pertinent parts of the following City Ordinances are included in Appendix "D".

Ordinance 121,338 rezoning Petitioner's Property to R-1H;
Ordinance 116,389 creating zone R-1H;
Section 12.12 of the Los Angeles Municipal Code establishing zone R-5;
Section 12.23C of the Los Angeles Municipal Code protecting non-confroming uses;
Section 12.03 of the Los Angeles Municipal Code defining the expression "use".

Reasons for Granting the Writ.

1. It is clear from the Opinion of the District Court (Appendix "A" p. 8) that if petitioner had made the expenditures involved in this case in reliance on a *"building permit"*, instead of a *"grading permit"*, petitioner would have acquired a "vested right" (*ibid.*) of which it could not constitutionally be deprived.[6] Petitioner believes that the *grading* of a building site, on the scale here in question (involving the excavation and recompaction of over 1,000,000 cubic yards of earth), is an essential part of the building process and that a *grading permit* is an integral part of the City's *authorization* to build. Moreover, petitioner contends that a *vested right* to build is not determined by the mere absence, or existence, of a *building permit* but upon a consideration of *all* the many factors involved in this case, including the many representations made by the City, the reliance placed by petitioner thereon, and the detriment suffered in consequence thereof.

It is necessary, therefore, for the Court to look at the facts. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. Rep. 158, Mr. Justice Holmes said this was always necessary in this type of case. He pointed out that the police power has its constitutional limitations and that, when the government's power to *regulate* private property in the public interest is in issue, *"the question depends upon the particular facts."*[7] (67 L. Ed. p. 325). It is the *"extent*

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[6]See, also, the cases on which the District Court relies, *viz.*: *Trans-Oceanic Oil Corporation v. Santa Barbara*, 85 Cal. App. 2d 776, *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, and *County of San Diego v. McClurken*, 37 Cal. 2d 683.

[7]In the following cases in California, the courts have declared that every zoning case must be declared on its own facts: *Para-*

(This footnote is continued on the next page)

of the diminution of the private rights" that is important and determines whether *"the legislature has gone beyond its constitutional power."* (*Ibid.*). The issue is "a question of degree—and therefore cannot be disposed of by general propositions." (*Ibid.*, p. 326). And the learned Justice added the *caveat:*

> *"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."*[8] (*Ibid.*).

The same relative approach appears in two noteworthy cases in the Supreme Court of New Jersey,[9] both involving a change of zone after the builder's rights had vested. The New Jersey Supreme Court held that the issue is determinable by a "balance of the equities" involved.

If this Court will balance the equities here, it will find on petitioner's side of the scales the following:

i. That petitioner had a validly issued Grading Permit to construct a *building site in an R-5 zone* which, when the Permit was issued, permitted *the multiple housing* which petitioner proposed to erect.

ii. That, in addition to issuing a grading permit, the City issued to petitioner additional permits to grade

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mount Rock Co. v. County of San Diego, 180 Cal. App. 2d 217, 228; *Edmonds v. County of Los Angeles,* 40 Cal. 2d 646, 651; *Livingston Rock etc. Co. v. County of Los Angeles,* 43 Cal. 2d 121, 126; *Beverly Oil Co. v. City of Los Angeles,* 10 Cal. 2d 552, 560.

[8]Emphasis here, and elsewhere in this Petition, unless otherwise noted, supplied.

[9]*Tremanco v. Garzio,* 32 N.J. 448; 161 A.T.L. 241; *Gruber v. Mayor and Township Committee of the Township of Raritan,* 39 N.J. 1; 186 A. 2d 489 (1962).

in an area other than a subdivision, to grade in the City's right-of-way and to extend the toe of the fill on the property onto adjacent land; that it approved petitioner's plans for temporary erosion control methods and devices in relation to the grading operations; and that each of these separate authorizations was given with full knowledge, on the part of the City *that the proposed use of the property was for the multi-housing projects contemplated by the then R-5 zoning* [Finds. 7-13].

iii. That the City had initially granted the R-5 zoning to petitioner expressly for the purpose of enabling petitioner to commence *R-5 construction,* which it thought would be in "the public interest," would provide "facilities which would be of local as well as general benefit to the community" and "would not be in conflict with any of the objectives of the Master Plan." [Find. 7].

iv. That in "reliance on said R-5 zoning and said Grading Permit and other administrative acts herein set forth and in good faith" [Find. 15], petitioner had entered into a grading contract with the contractor for the removal of over 1,000,000 cubic yards of earth, for the construction of 47,710 square feet of asphalt concrete paving terraces, for the installation of 1,786 linear feet of corrugated metal pipe, all for a total contract price of $526,796.00 (*Ibid.*).

v. That pursuant to that grading contract, petitioner, before the enactment of the rezoning ordinance, had actually removed and recompacted 424,000 cubic yards of earth, 11,000 cubic yards of granite ditches and over 2,200 linear feet of sub and slope drains [Find. 32].

vi. That the total costs expended by petitioner "for the purpose of developing the subject property" was the sum of $522,541.55 [Find. 29].

vii. That while petitioner was advised, at the end of October, 1961, that the Planning Commission proposed to institute proceedings to rezone its property, petitioner had already, pursuant to its grading permit, denuded the hillside of brush, undercut "huge quantities of fill," created additional quantities of fill through the construction of haul roads and that on October 27, 1961 the situation, so far as adjacent property owners were concerned, was "highly dangerous in the event of rainfall." That in these circumstances petitioner's decision on October 27, 1961 to proceed with the grading was "an entirely reasonable one to make." [Find. 21].

viii. That by proceeding with the grading to a date shortly preceding the date of the enactment of the rezoning Ordinance (April 15, 1962), petitioner at a cost of $305,287.12 (Appendix "A" p. 6) was able to construct benches and raise the level of the fill to the point where the water was channelled out of the area and into canyons where no danger to adjacent property owners was involved. [Rep. Tr. p. 865 *et seq.*]

ix. That on June 15, 1960 the City rezoned all property adjacent to petitioner's property to zone R-1H but left petitioner's property zoned R-5, and that *since that date* petitioner spent over $305,287.12 to develop its property for *R-5 purposes.*

x. That prior to the commencement of its grading operations, petitioner had gone to William E. Milburn, the City's Superintendent of Grading, and the City's senior officer in charge of grading operations, and

pointed out that the precise location of its structures on the property had not yet been determined; that petitioner was thereupon advised by the Superintendent that "he saw no reason why (petitioner) could not proceed with (its) project *since it was already zoned R-5.*" [Rep. Tr. p. 161, lines 3-13, quoted in Petition for Hearing p. 31].

xi. That the highest and best use of petitioner's property was for R-5 development. That for R-5 purposes the land was worth between $210,000.00 and $273,000.00 but that for R-5 purposes it was worth $1,200,000.00 or about five times as much [Find. 37].

xii. That prior to the effective date of the Ordinance, petitioner had on file a valid application for a building permit and building plans, showing the precise nature and location of the buildings to be erected thereon, all in accordance with the zoning *on that date, i.e.,* March 27, 1962, in force. That these plans were sufficient to erect the buildings shown thereon and that, except for this zoning ordinance, a building permit would have been issued to petitioner on June 2, 1962 [Find. 24], which date was well within the customary period taken by the Department of Building and Safety to examine and check building plans of this complexity [Finds. 23, 24; Rep. Tr. p. 1445, line 11 *et seq.*].

xiii. That the purpose of the grading authorized by the Grading Permit was the creation (by means of enormous cuts and fills) of a large level building pad which was not suitable for single family residences. That to complete the half-finished grading for R-1H uses would serve no purpose, for petitioner could not possibly move 1,000,000 cubic yards of earth and expect to sell R-1H

homesites at a profit [Rep. Tr. p. 514 *et seq.* and see the testimony excerpted at p. 66 *et seq.* of Pet. for Hear.]. That the City's only witness in this respect, Karl Gurston, the City Planner, agreed that the creation of hillside terracing was the only feasible grading for R-1H purposes [Rep. Tr. p. 2114, lines 4-10].

What then are the equities to be placed on the City's side of the scales? If we turn to the conclusions of the Court below, denominated "findings," it appears (para. 45) that the change of zone was "consistent and compatible with" the R-1H zone, in which adjacent property had been placed; that it was "rationally connected" with maintaining "limited density" of development for the entire area; that it would permit "completion and effectuation of the Santa Monica Master Plan" and that it would "*further* overburden the already inadequate public facilities including public streets and highways." That is all. Of course, the District Court was not bound by these conclusions[10] nor is this Court. So their validity may be examined.

In the first place, the Santa Monica Master Plan established, for petitioner's property, *twice* the density fixed for all other lots in the same R-1H zone: *i.e.*, 5 dwelling units per acre for this property as against 2½ units for other lots in zone R-1H [Map 11, Ex. EEE; App. "E"].

Secondly, the number of dwelling units authorized for this property by the Master Plan, *i.e.*, five (5) units per acre, could not possibly be constructed on an acre of R-1H property. For the minimum area of an R-1H

[10] *Hammer v. Town of Ross* (1963), 59 Cal. 2d 776. In Finding 39, the Trial Court found the actual reasons why the City acted, none of which has anything to do with these conclusions.

homesite, fixed by statute was 15,000 square feet [Find. 17]. As this Court is aware, an acre contains 43,560 square feet and less than *three* (3) 15,000 square feet dwelling units can be placed on an acre of R-1H property!

Thirdly, the treatment accorded petitioner's property is *sui generis* and a comparable situation does not, and could not, exist in the City of Los Angeles. For it cannot be assumed that the City elsewhere, or otherwise, authorized for R-1H property, anywhere in the City, the construction of an *impossible* number of dwelling units. This is the "invidious discrimination" of which Mr. Justice Douglas speaks in *Queenside Hills Realty Co. v. Saxl,* 328 U.S. 80, 85.

Fourthly, the testimony relating to the "further overburdening" of public roads was limited to that portion of Mulholland Drive between *Coldwater Canyon Drive and Coldwater Canyon Avenue*. It was already overburdened. The only independent and qualified expert called in the case testified that the increase of traffic resulting from this development would be "minor" [Clk. Tr. p. 1246, line 7, to p. 1247, line 6; see Appx. to App. Op. Br. p. 71]. Moreover, zoning looks to the future. And even if the street were overburdened, then, as the City urged in *Robinson v. City of Los Angeles,* 146 Cal. App. 2d 810 (and as the Court in that case held), adequate municipal facilities would, in due course, be supplied.[10a]

[10a] The testimony of the expert witnesses is set forth extensively between pages 40-76 of the Appendix to Appellant's Opening Brief. The suggestion in the Opinion of the District Court that specific findings were not requested, in connection therewith, is factually in error. (See Petition for Hearing p. 49 *et seq.*)

We submit that this is the way in which the equities of this case should be considered. By balancing what is secured for the City by what is taken away from petitioner, this Court can reach a decision which will satisfy a proper sense of justice. The Trial Court was sensitive of the calamitous consequences attendant upon this rezoning [Clk. Tr. p. 2686-A]. The District Court was not. It may be explained, possibly, by the fact that the Trial Judge saw and heard the witnesses and had the opportunity of going on the site and viewing the tremendous fills and the vast areas of unfinished excavation. (Appendix "F".)

2. We do not have here the case of a general zoning ordinance of broad and general application. We have "spot" zoning applicable, as in the case of *Pennsylvania Coal Co. v. Mahon, supra,* to a particular piece of property. In *Mahon* Mr. Justice Holmes felt that both a "public interest" and "exigency" were involved and that the "greatest weight should be given to the judgment of the legislature". But, these considerations did not, in his judgment, warrant "shifting the damages" to the single owner of the property. He said "the question at bottom is upon whom the loss of the changes desired shall fall" (p. 326).

3. It is the rule that where a general zoning ordinance is under consideration, a property holder is not permitted, during the interim, to acquire vested rights which will defeat the entire classification scheme. But that is not our case. Here, the rezoning affected petitioner's property only. In this case, it was "reasonable" and not "morally reprehensible" for petitioner to proceed. Petitioner proceeded because of the "highly dangerous" situation which confronted its neighbors and be-

cause its "hope and expectation" that the Ordinance would never become law was "reasonable". Its good faith was never questioned and good faith is the determinative criterion of where the risk lies. *Township of Lower Merion et al. v. Frankel,* 64 Montg. Co. L. R. (Pa.) 14, 358 Pa. 430; *Rex v. Borough of Landsdale,* 68 Montg. Co. L. R. (Pa.) 186; *American Veterans Housing Co-operative, Inc. v. Zoning Board of Adjustment,* 60 D. & C. (Pa.) 449.[11] In the Opinion of the District Court, petitioner's good faith is ignored.

4. This decision poses, directly, an issue of great importance to builders generally, and to banks and lending institutions in California. The question is: what reliance can be placed on zoning laws, and permits issued under them, at the local level? What the District Court has said, is that pre-*building permit* activities, no matter what municipal authorizations have been secured, or what expenditures have been made under them, or what changes of position have taken place, can never create a vested right to build. But this is not the rule in other states (Pennsylvania, New York, Illinois, and Michigan),[12] and the enunciation of any such doctrine could impede the progress of future real estate development throughout the State. By way of illustration,

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[11]These three cases are excerpted and discussed in Appellant's Petition for Hearing, page 45 *et seq.*

[12]In the following cases injunctive, or like, relief was afforded the landowner, or builder, for expenditures in advance of the issuance of a building permit, or where no building permit was issued, at all: *Herskovits v. Irwin,* 299 Pa. 155; *People v. Village of Morton Grove,* 17 Ill. 2d 183; *Fifteen Fifty No. State Bldg. Corp. v. City of Chicago,* 15 Ill. 2d 408; *Township of Lower Merion et al. v. Frankel,* 64 Montg. Col. L. R. (Pa.) 14, 358 Pa. 430; *Rex v. Borough of Landsdale,* 68 Montg. Co. L. R. (Pa.) 186; *American Veterans Housing Cooperative, Inc. v. Zoning Board of Adjustment,* 60 D. & C. 449; *In the Matter of Glenel Realty Corp. v. Carroll M. Worthington, as Building In-*

(This footnote is continued on the next page)

there is, in the City of Los Angeles, an extraordinary development called Century City. Millions of dollars have been spent in extensive *grading of* multiple housing and commercial sites. It is not presently known what type of building (authorized by the zone) will go on any particular building site. Hence in most cases, applications for building permits have not been filed. It is inconceivable that, at this stage, the City can be permitted to change the zone to R-1H, although no building permits have been applied for or issued. Even the City's Principal Planner, Ourston, said that any such action would be "quite unfair" [Rep. Tr. p. 2176, line 11, to p. 2177, line 11]. We believe that in this emerging field, guide lines from this Court are urgently required.

5. It is hardly debatable that governments should exhibit even more scrupulous regard for justice and higher morality than is required of individuals. And this Court has shown mounting exasperation with the claim that Government agencies are immune from equitable claims of this character. Mr. Justice Jackson in *Merrill v. Federal Crop Insurance Corporation,* 332 U.S. 380 insists that a government agency should be held to "the same fundamental principles of fair dealing that progressive states apply to private companies."[13] Nevertheless, the District Court betrays no

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spector of the Town of Greenburg, 4 App. Div. (N.Y.) 2d 706; *Ohlau v. Kleinert,* 201 N.Y.S. 83; *City of Little Falls v. Fisk,* 24 N.Y.S. 2d 460; *Rosenberg v. Village of Whitefish Bay, et al.,* 225 N.W. 838; *Cos Corp. v. Evanston* (Ill.), 190 N.E. 2d 346.

All these cases are discussed in Appell. Op. Br. p. 41 *et seq.* Mr. E. C. Yokely in his book, "Zoning Law and Practice", 3rd Ed. Vol. 1, p. 409, states that the rule of these cases is in accordance with the modern trend.

[13]For California cases to the same effect, see *Farrell v. County of Placer,* 23 Cal. 2d 629 and *City of Fontana v. Atkinson,* 212 Cal. App. 2d 499.

concern over the enormous losses sustained by petitioner or the extraordinary option offered petitioner at this stage, *viz.*: either (a) to abandon the property entirely, or (b) to expend an aggregate sum of over $1,000,000.00 to complete the job,[14] and have, in the end, a site which is unsuited for R-1H homesites and which would offer no possibility of recoupment.[15]

Conclusion.

For the reasons set forth above it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

BARRY BRANNEN,
Counsel for Petitioner.

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[14]The figures are analyzed at pages 18 and 19 of App. Reply Brief.

[15]The testimony is excerpted at page 18 *et seq.* of Petition for Hearing.

APPENDIX "A".

Opinion of the District Court of Appeal, Second Appellate District, State of California.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Spindler Realty Corporation, a corporation, Petitioner and Appellant, vs. John C. Monning, as General Manager, etc., Respondent.

Spindler Realty Corporation, a corporation, Plaintiff and Appellant, vs. City of Los Angeles, Defendant and Respondent. 2nd Civ. No. 29616.

Filed: June 29, 1966.

Appeals from judgments and orders of the Superior Court of Los Angeles County. Otto M. Kaus, Judge. Judgments affirmed. Appeals from orders dismissed.

Barry Brannen, for Appellant.

Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney, Robert C. Summers, Deputy City Attorney, and William B. Burge, Deputy City Attorney, for Respondent.

These are appeals from a judgment of the Superior Court denying a petition for a writ of mandate and from a judgment declaring the rights of the parties and denying an injunction.

In its first action appellant Spindler Realty Corporation (hereafter referred to as Spindler) sought a writ of mandate or writ of certiorari commanding John Monning, as General Manager and Superintendent of Building of the Department of Building and Safety of the City of Los Angeles, to issue a building permit for which it had applied and to rescind his action denying

the permit. In its second action, Spindler sought an injunction against the enforcement of a certain zoning ordinance and a judgment that the ordinance is null and void insofar as it affects Spindler's property. For convenience, Monning and the City of Los Angeles are here referred to collectively as the City. The actions were consolidated for trial and separate judgments were entered in each action denying the relief sought by Spindler. Pursuant to stipulation, the appeals are consolidated for hearing and decision here.

The Facts

There is no dispute as to the following facts as found by the court in both actions. In 1948 Spindler was the owner of the subject property consisting of approximately twenty-one acres in the Santa Monica Mountains, located on Mulholland Drive near its junction with Coldwater Canyon Drive. Spindler also owned substantial adjacent property. In September of that year, on Spindler's appliaation, the subject property was rezoned from R-1 to R-5, thus permitting the construction of a hotel or apartment house or other multiple dwelling. At that time the City refused to rezone Spindler's adjacent property from R-1 to C-1 so that it could be used for commercial purposes.

In April 1956, in proceedings instituted by Spindler, the Municipal Code was amended to authorize the carrying on of incidental business and recreational facilities in any hotel or apartment house situated on property zoned R-5, subject to certain conditions not material here. Shortly thereafter, Spindler obtained a conditional use permit for such use of its property through November 1956. This conditional use was later extended and

remained in effect until December 4, 1961. In August 1956 Mulholland Drive was designated as a major highway.

In June 1960, in connection with the development of a comprehensive master plan of land use for that part of the Santa Monica Mountains including the subject property, all the property adjacent to and surrounding the subject property was rezoned from R-1 to R-1-H. The general effect of this rezoning was to increase the lot size for single family dwellings to 15,000 square feet. The subject property remained zoned R-5.

In August 1961 the Board of Building and Safety Commissioners modified its grading regulations to permit Spindler to develop a building site in an area other than a subdivision. On September 27, 1961, a grading permit was issued to Spindler for the preparation of a building site on the subject property without reference to any particular proposed use of the property as to the number, size or type of buildings to be erected on the site. Later Spindler filed the required bond of $275,000 conditioned on its faithful compliance with the terms and conditions of a grading permit to grade in the City's right of way in Mulholland Drive. It also filed plans for temporary erosion control methods which were approved by the Department of Public Works. On November 17, 1961, the City also authorized Spindler to extend the toes of fillslopes on certain adjacent property owned by C. W. Foster, Inc.

On October 9, 1961, J. A. Thompson & Son started work on the subject property under the grading permit, consisting of brush clearance and access road leveling. The property had been staked by surveyors a few days earlier. On October 18, 1961, "in reliance on said R-5

zoning and said Grading Permit and other administrative acts" of the City, Spindler, in good faith, entered into a contract with J. A. Thompson & Son for the grading of the subject property in accordance with the building permit. By this contract Spindler agreed to pay J. A. Thompson & Son not less than $562,796, based on the actual amount of the work done. Work under this contract was discontinued on March 8, 1962, except for putting the development and maintaining it in a safe condition.

On October 26, 1961, the City Planning Commission, finding that "no development activity had occurred on the property," initiated proceedings to consider the rezoning of the subject property from R-5 to R-1-H. When this resolution was adopted the Planning Commission was mistakenly informed that no physical development work had been done on the property and that Spindler had not talked with its architect for over two and one-half years. On October 31 Spindler asked for a reconsideration of the resolution which had been adopted without notice. Following a public hearing before a hearing examiner of the Planning Commission on December 18, the Commission adopted the examiner's findings and recommended the change of zone. On March 8, 1962, the City Council adopted ordinance No. 121338, the subject of this action, rezoning the subject property from R-5 to R-1-H. This ordinance became effective April 15, 1962.

With the several dates referred to in the foregoing paragraph in mind we turn to certain other findings. The court found that on October 27, 1961, the grading operations "had reached a point where it would have been highly dangerous in the event of rainfall to

have done nothing for the protection of property owners below the grading operations" and that, under this and other circumstances spelled out in the finding, Spindler's decision immediately after October 27, the day on which he had been informed of the Planning Commission's resolution of October 26 "to proceed with the grading was an entirely reasonable one to make." As of October 26 "a substantial portion of the grading under the grading permit had been performed" on the subject property; that "at the very least [Spindler] had acquired a vested right to complete the grading under the grading permit issued to it, and that if it should be the law that a vested right under said grading permit gives petitioner a vested right not only to complete the grading but also to build as permitted by R-5 zoning, a vested right to so build, subject to all other laws and ordinances applicable, had arisen."

After the property was rezoned R-5 in 1948, Spindler sought to develop the property for a hotel. When it became apparent in 1960 that financing a hotel was not feasible, Spindler had plans prepared for an apartment house complex, proceeding therein in good faith "at least until October 27, 1961," in reliance on the R-5 zoning. Before the commencement of grading in October 1961, "the best and economically the most feasible use for the subject property was for R-5 multiple family dwellings" although on October 27 extensive grading would have to be done to develop it for any purpose.

On February 23, 1962, Spindler filed plans for a high-rise apartment complex and an application for a building permit, but because these plans were inadequate for checking it asked the Department of Building and

Safety not to check them and to wait for new plans. New plans were filed on March 27. On April 13 Spindler applied for a "foundation only" building permit, but this was denied because the site was not suitable for immediate construction, even if it had remained zoned R-5. The Department approved, on April 16, the hearing and refrigeration plans as submitted by Spindler. On April 27 the Department of Building & Safety submitted to Spindler a detailed list of corrections to the building plans filed March 27 and advised Spindler that the proposed construction was prohibited by the zoning regulations [presumably by the ordinance adopted March 8]. Spindler asked the Department to proceed with the plan checking. On May 1 the Fire Department also submitted a detailed list of corrections. The parties stipulated that all required corrections either had been or could be made after June 1, 1962.

The court found that from 1948 through the year 1964 Spindler spent $522,541.55 in the development of the subject property. Of this, $305,287.12 was spent during the period of November 1, 1961 through April 30, 1962. The obligations accruing before January 1, 1961, were incurred in connection with both the hotel development and the apartment development. All those after January 1, 1961, were incurred in connection with the apartment house development.

Ever since June 1, 1962, the Department of Building and Safety has refused to issue a building permit, although at all times Spindler has "sincerely desired" such a permit. The parties stipulated that Spindler exhausted all administrative remedies available to it before turning to the court for relief.

Certain other findings will be commented on when we consider Spindler's contentions on these appeals.

The Issues

Appellant's primary contentions common to both actions are: (1) that on the facts found by the trial court it had a vested property right in the development of its property, of which it could not be constitutionally deprived; (2) that it had acquired a nonconforming use which was protected under the provisions of section 12.23C of the Los Angeles Municipal Code; and (3) that the ordinance adopted March 8, 1962, was oppressive and discriminatory and bore no relation to the public welfare or safety and is unconstitutional on that ground.

Appellant's Claim That It Has A Vested Right

We assume at this point that the ordinance adopted March 8, 1962, is valid, "and insofar as it can be complied with and applied without a denial of constitutional rights it will be held to be proper and lawful legislation." (*Bernstein v. Smutz,* 83 Cal.App.2d 108, 120.) But, as the court there said, "a statute, innocuous and valid on its face, may become invalid in its application, in which event it is proper for the petitioner to show the facts by which he contends that as to him the law is unreasonable, oppressive and void."

Section 91.0201 of the Los Angeles Municipal Code provides that no person shall commence or perform any grading without a permit. Under the grading regulations of the City, grading may be conducted only for the purpose of building. The same section of the Municipal Code also provides that a building permit must be obtained before commencing the construction of any building.

The general rule applicable to all cases such as this is that if a property owner has acquired a vested right under a permit, the permit cannot be revoked, particularly where, on the faith of the permit, the owner has incurred material expense. " 'Such a permit has been declared to be more than a mere license revocable at the will of the licensor. When, in reliance thereon, work upon the building is actually commenced and liabilities are incurred for work and material, the owner acquires a vested property right to the protection of which he is entitled.' " (*Trans-Oceanic Oil Corp. v. City of Santa Barbara,* 85 Cal.App.2d 776, 784. To the same effect see *Kissinger v. City of Los Angeles,* 161 Cal.App.2d 454.) "[A] permittee who has expended substantial sums under a permit cannot be deprived by a subsequent zoning ordinance of the right to complete construction and to use the premises as authorized by the permit." (*County of San Diego v. McClurken,* 37 Cal. 2d 683.) These rules are reiterated in the recent case of *Anderson v. City Council,* 229 Cal.App.2d 79, where the court said (pp. 89-90): "Where a building permit to erect a specific type of building is issued by a county or city and the permittee acts upon it and incurs obligations, or in good faith commences construction, his rights become vested and the governmental body is thereafter estopped to set up a zoning ordinance subsequently enacted. (*Price v. Schwafel, supra,* [92 Cal. App.2d 77].) Where no such permit has been issued, it is difficult to conceive of any basis for such estoppel. . . . These authorities [*Brougher v. Board of Public Works,* 205 Cal. 426; *Jones v. City of Los Angeles,* 211 Cal. 304; *Trans-Oceanic Oil Corp. v. City of Santa Barbara,* 85 Cal.App.2d 776; *Griffin v. County of*

Marin, 157 Cal.App.2d 507] establish the rule that respondents did not acquire a vested right, as against future zoning, merely by purchasing the property in reliance on the existing zoning and thereafter making certain endeavors to develop it for a specified use. Since all of these acts were performed prior to the date upon which respondents sought to obtain a building permit, they could not have been performed in reliance on the required official action, or the granting of a license or privilege, by the City. It follows that respondents never acquired any privilege which could ripen into a vested right and that the court erred in holding that the city was estopped from rezoning respondents' property."

Spindler concedes that it has no building permit. Its contention is that its claim to a vested right to proceed with the building of multiple dwellings does not depend upon the issuance of a building permit but upon a showing that after the R-5 zone was established it relied in good faith on the permissive actions and authorizations of the City, including the issuance of the grading permit, all taken pursuant to existing zoning, and that it incurred "substantial construction costs and like obligations" in reliance on such permissive actions and authorizations. Spindler seems to contend that, in view of the findings of the trial court in its favor on these matters, the City was estopped to refuse to issue a building permit by reason of that ordinance. Of course, Spindler did not incur any "construction costs," and the trial court did not so find. Further the court found only that "in reliance on said R-5 zoning petitioner, at least until October 27, 1961, at all times proceeded in good faith to complete said engineering and architectural plans."

The trial court found that as of October 26, 1961, Spindler had at the very least acquired a vested right to complete the grading under its grading permit. In the final analysis the question before us, as the trial court recognized, is whether that vested right gives Spindler a vested right, without the issuance of a building permit, not only to complete the grading but also to build as permitted by R-5 zoning, so as to render the later rezoning inoperative. We think this question must be answered in the negative.

Although we find no decisions squarely in point, the case here is closely analogous to *Anderson v. City Council,* 229 Cal.App.2d 79. In that case plaintiffs had purchased the property after being assured by the City officials that construction of a service station was "still a permissible use." Thereafter, they invested some $3,000 in time and money in attempting to secure a leasing agreement with an oil company and in otherwise preparing to develop the property for a filling station. Several months after the purchase of the property the owners applied for a building permit. Four days later the City Council adopted an emergency ordinance requiring a land use permit for each new use of property within the district. A few months later the City Council voted to deny the owners' application for a land use permit. There, as here, there was evidence that the property was worth substantially more for the intended use than it would be worth if such use were prohibited. After an extensive review of the cases the court held (p. 90) that these authorities "establish the rule that respondents did not acquire a vested right, as against future zoning, merely by purchasing the property in reliance on the existing zoning and thereafter making cer-

tain endeavors to develop it for a specific use. Since all of these acts were performed prior to the date upon which respondents sought to obtain a building permit, they could not have been performed in reliance on the required official action, or the granting of a license or privilege, by the city. It follows that respondents never acquired any privilege which could ripen into a vested right . . ."

The fact of the matter is that at all times after October 27, 1961, Spindler was taking a calculated risk. That was the day that Spindler learned of the resolution adopted the day before, initiating proceedings for the rezoning of the subject property for R-5 to R-1-H. It is true that from 1959 and at least until October 27, 1961, Spindler was proceeding in good faith to complete its engineering and architectural plans for an apartment house complex on the property in reliance on the R-5 zoning, as the court found, and doubtless in reliance on the totality of the permissive actions and authorizations of the City during that period. The court also found that on October 26, Spindler "had every reasonable hope and expectation that the proposed rezoning of the subject property from R-5 to R-1-H would not eventually become the law. In addition, the legal status of the date of October 26, 1961, as a date after which petitioner might eventually be found to have expanded money at petitioner's risk was, and still is, uncertain. It was further uncertain at the time whether it would eventually be found, as a matter of law, that petitioner could acquire vested rights to build under a grading permit as distinguished from a building permit, and what the crucial date of the acquisition of such vested rights might be" and that under these circum-

stances and others relating to the conditions of the property, Spindler's decision "immediately after October 27, 1961, to proceed with the grading was an entirely reasonable one to make, and that there was nothing whatsoever morally reprehensible in proceeding."

In *City of Tucson v. Arizona Mortuary,* (Ariz.) 272 P. 923, the property owner had purchased land, obtained a building permit and let a contract for the building of a mortuary, but before any material amount of construction had been done it was fully advised that, on the application of a majority of the property owners in the area, the common council of the city was considering an ordinance which would have prevented the use of the property for that purpose. "Instead of awaiting the action of the council, it apparently proceeded on the theory either that the ordinance would not be passed, or that, if passed, it was void. Having taken that chance, it may not now be heard to set up any loss to it which arose *after* it had knowledge that the ordinance was being considered. But even if plaintiff suffered some damage through things occurring *before* the protest, financial loss, no matter how severe, does not of itself give parties a vested right to continue a business, no matter how long it has been conducted, if the business is one whose location may be regulated under the police power." In holding that the plaintiff was not entitled to an injunction against the enforcement of the ordinance, the court quoted with emphasis from *Hadacheck v. Sebastian,* 239 U. S. 394, where it was held, on review of a judgment of the Supreme Court of this state involving the validity and enforcement of a zoning ordinance (165 Cal. 416), that

the imperative necessity for the existence of the police power "precludes any limitations upon it when not exercised arbitrarily. *A vested interest cannot be asserted against it because of conditions once obtaining.*" Furthermore, said the court in *City of Tucson,* "any loss for money expended *after* plaintiff had notice of the proposed ordinance was at its peril, and cannot be considered as a vested right, entitled to any consideration." *Rosensweig v. Crinnion,* 139 N.Y.S.2d 172, and *Kiges v. City of St. Paul,* (Minn.) 62 N.W. 2d 363, are to the same effect.

There is nothing in the cases on which appellants rely which lead us to a different conclusion. Such cases as *Trans-Oceanic Oil Corp. v. City of Santa Barbara,* 85 Cal.App. 2d 776, and *Kissinger v. City of Los Angeles,* 161 Cal.App. 2d 454, simply affirm the proposition that a land owner has a vested right to use his property in accordance with the terms of his permit, and that a valid permit once issued cannot be arbitrarily revoked.

The decisions from other jurisdictions cited by Spindler are not persuasive. In *Herskovits v. Irwin,* 229 Pa. 155, for example, the court held that where, upon application for a building permit to construct a six story building which complied with the zoning laws then in effect, the owners were issued a permit for "excavation and form work in accordance with foundation plan submitted," and thereafter incurred substantial expense and obligations and commenced work on the excavation, they acquired a vested right to a permit to complete the building of which they could not be deprived by a subsequently enacted amendment to the zoning ordinance limiting the permissible height of build-

ings. It may well be, as the court there said, that it would not satisfy "a proper sense of justice" to say, in the circumstances of that case, a vested right was created in the foundations of the six story building but not in the building itself. There the limited permit had been issued on an application for a building permit accompanied by drawings which showed the general scheme of the building, and the court held that in reality the owners were simply taking "a second step in their effort to obtain a formally complete permission to erect their building." That is not the case here.

Such cases as *People v. Village of Morton Grove,* 17 Ill. 2d 183, and *Fifteen-Fifty No. State Bldg. Corp. v. City of Chicago,* 15 Ill. 2d 408, are distinguishable here, in that in each of those cases a building permit had been issued and was later revoked. It is true that in the *City of Chicago* case, the court approved the decision in *Deer Park Civic Ass'n v. City of Chicago,* 347 Ill. App. 346, that any substantial change of position, expenditures or incurrence of obligations occurring under a building permit or in reliance upon the probability of its issuance is sufficient to create a right in the permittee and entitles him to complete the construction and use of the premises for the purposes originally authorized irrespective of a subsequent zoning or change in zoning classification. Here, of course, Spindler knew when it obtained its grading permit that under the Municipal Code it would be required to obtain a building permit in order to construct any buildings on its property. On October 27, 1961, it knew that proceedings had been initiated to rezone its property. While it then had "every reasonable hope and expectation that the proposed rezoning of the subject property from R-5 to

R-1-H would not eventually become the law," as the trial court found, it cannot be said that it thereafter incurred any obligations or expended substantial sums of money in reliance upon the probability that a building permit for R-5 construction would be issued.

In short, we are not convinced that a grading permit is analogous to a building permit, as contended by Spindler, even though under the regulations of the Department of Building and Safety, a grading permit on hillside property may only be granted for building purposes and a building permit would not have enabled it to build without a previously issued grading permit.

Spindler further claims that the trial court's Finding 43, that it had no vested right to erect any particular building or type of building or to put its property to any particular use except as permitted by the ordinance, is erroneous because its right to a building permit for multiple dwellings under the R-5 zoning was determined on March 27, 1962, the day on which it filed its application for a building permit. This contention is based on the fact that the ordinance did not take effect until April 15, and that the parties stipulated that all required corrections in the building plans filed with its application "either have been or can be made after June 1, 1962."

This contention has no merit. It was expressly held in *Brougher v. Board of Public Works,* 205 Cal. 426, 434-35, in which the sequence of events is substantially the same as that in the case here, "that petitioners were not entitled to have granted to them the permit applied for by merely showing that they had complied with all the laws and ordinances effective in said municipality at the time of the filing of the application

with said Board of Public Works when the further fact appeared that before final action had been taken on their application the ordinances under which said application had been made had been amended by the board of supervisors." As the court there said: "In such cases there is no opportunity for any privilege to ripen into a vested right, for the reason that no privilege, in the sense used in the authorities, is acquired until a permit has been issued." The earlier case of *Miller v. Board of Public Works,* 195 Cal. 477, is to the same effect. *Munns v. Stenman,* 152 Cal.App.2d 543, *McCombs v. Larson,* 176 Cal.App.2d 105, on which Spindler relies are readily distinguishable on the facts and are not in point.

We come back then, to *Anderson v. City Council,* 229 Cal.App.2d 79, where the court said (p. 89) that the property owners there "have been unable to cite a single California decision in which a property owner has been held to have acquired a vested right against future zoning without having first acquired a *building permit* to construct a specific type of building, and having *thereafter* expended a considerable sum in reliance upon said permit. Such authority would appear nonexistent for the reason that the vested rights theory is predicated upon estoppel of the governing body. . . . Where no such permit has been issued, it is difficult to conceive of any basis for such estoppel." (Emphasis by the court.) Since no building permit was issued to Spindler, the City was not estopped to adopt the ordinance rezoning Spindler's property from R-5 to R-1-H.

Appellant's Claim to a Protectable Non-Conforming Use

Appellant also claims that the facts found by the trial court established that it has a non-conforming use protected by section 21.23C of the Los Anglees Municipal Code. The argument is that what is protected is the "intended" use or the purpose to which the land "may be put"; that the preparation of land for the employment of buildings is a "use" of the land for which it is entitled to protection; that where "buildings are employed" in connection with such "intended" use there is no amortization period for the liquidation of the use; and that if this were not so, ordinance 121338 would be unconstitutional.

This argument is not tenable, in that it is erroneously based on the definition of "use" in the Municipal Code and is contrary to the law. "Use" is there defined as: "The purpose for which land or a building is arranged, designed, or *intended* or for which either land or a building is or *may be* occupied or maintained." It is obvious, however, that the protection afforded to a "non-conforming use" by section 12.31C extends only to a "non-conforming use" which is defined in section 12.03 as: "A use of a building or land which does not conform to the regulations of this Chapter and which lawfully existed at the time the regulations, with which it does not conform, became effective." As the court said in *Anderson v. City Council,* 229 Cal.App.2d 79, 88: "[I]t is the rule that 'The activity of the owner in the use of his property at the time it becomes subject to a zoning

ordinance and not his plans regarding the future use of that property determines the scope of the nonconforming use excepted from the restrictions imposed by the ordinance.' (*Paramount Rock Co. v. County of San Diego,* (1960) 180 Cal.App.2d 217, 232 . . . *Jones v. City of Los Angeles* (1930) 211 Cal. 304; *Willett & Crane, Inc. v. City of Palos Verdes etc. Estates,* (1950) 96 Cal.App.2d 757, 761.)"

In this case the learned trial court found as facts that: "42. Except for the grading on the subject property herein referred to and certain geological work, soil tests and surveying in connection therewith, there has been no actual existing use of the subject property for any purpose from September 27, 1961, to date, no building of any kind has ever been erected on the subject property and there has never been any use in connection with any building. 43. Petitioner and plaintiff has no vested or any other right to erect any particular building or type of building upon the subject property or to put it to any particular use, except as may now or hereafter be lawfully permitted . . . 44. Petitioner and plaintiff has not at any time mentioned herein established a nonconforming use of any kind upon the subject property." These findings, which are clearly supported by substantial evidence, appear to us to be findings of ultimate fact. Even if Findings 43 and 44 are considered as misplaced conclusions of law, the court's conclusions of law are to the same effect, and as such they are supported by the facts found in Finding 42. The fact that appellant's grading permit was not usable except to prepare the land for buildings does not compel a different conclusion.

The Validity of the Ordinance

It is further claimed by appellant that Ordinance 121338 is arbitrary, discriminatory and confiscatory in its application to the subject property, and bears no reasonable relation to the public safety and welfare. Accordingly, it asserts that, considered as findings of fact, the conclusion of the trial court incorporated in Findings 45, 46 and 47 are without support in the evidence.

The trial court found that the rezoning of the subject property from R-5 to R-1-H was consistent with the earlier, similar rezoning of all the surrounding and adjacent property, and was "consistent and compatible" with the existing zoning, land use and development of the adjacent and surrounding property; and that such rezoning is rationally connected with maintaining a limited density of development in the whole area in order to permit completion of a master plan and in order not to "further overburden . . . inadequate public facilities" in the area, including public streets and highways. The court also found that the ordinance "bears a substantial relationship to the accomplishment of a proper public purpose under the police power, and is not arbitrary or unreasonable. Its adoption is a matter over which reasonable minds might differ." Finally, the court found that the application of the ordinance to the subject property does not deprive the owner "of the entire use or entire economic benefit of its property and is not discriminatory or confiscatory. On the contrary, said ordinance is reasonable in object and not arbitrary in operation."

The power of the courts of this state on review of the acts of a legislative body in the exercise of the police power is limited. "The determination of the need for a

mode of exercising the power is primarily for the legislative body and the courts will not hold enactments invalid unless they are palpably unreasonable, arbitrary or capricious, having no tendency to promote the public welfare, safety, morals, or general welfare." (*Justesen's Food Stores, Inc. v. City of Tulare,* 43 Cal.App.2d 616, 621.) "A statute is not to be condemned as an improper exercise of the police power if any rational ground exists for its enactment. [Citations.] Every presumption is in favor of the validity of a statute, and its invalidity must be clear before it can be declared unconstitutional. [Citations.]" (*Corning Hospital District v. Superior Court,* 57 Cal.2d 488, 496.)

". . . [a] zoning ordinance, or its application to particular property, must have a 'reasonable tendency to promote the public morals, health, safety, or general welfare and prosperity of a community' (*Miller v. Board of Public* Works, [195 Cal. 477] at. p. 488), and be free from arbitrary and discriminatory conception and application . . ." (*Robinson v. City of Los Angeles,* 146 Cal.App.2d 810, 815.) "Questions of reasonableness and necessity depend on matters of fact. They are not abstract ideas or theories." (*Ayers v. City Council of Los Angeles,* 34 Cal.2d 31, 41.) But the necessity for the particular ordinance "is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity?" (*Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515, 522.) As the court there said, quoting from *Miller v. Board of Public Works, supra,*

" 'when the necessity or propriety of an enactment [is] a question upon which reasonable minds might differ, the propriety and necessity of such enactment [is] a matter of legislative determination.' So in *Ambler, supra* [*Euclid v. Ambler Realty Co.,* 272 U.S. 365], the United States Supreme Court said (272 U.S., at p. 388): 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.' " "It is also the rule that the motives of the legislative body may not be weighed in measuring the legality of their action. (*McCarthy v. City of Manhattan Beach,* . . . 41 Cal.2d 879, 894 . . .; *Ferris v. City of Alhambra,* . . . 189 Cal.App. 2d 517, 525. . . .)" (*Anderson v. City Council,* 229 Cal. App.2d 79, 91.) Nor does the fact that the property owner may suffer some financial detriment "require invalidation of the zoning restriction, for 'every exercise of the police power is apt to affect adversely the property interest of somebody.' (*Zahn v. Board of Public Works,* 195 Cal. 497, 512. . . .)" (*McCarthy v. City of Manhattan Beach,* 41 Cal.2d 879, 890; *Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal.2d 515, 530.)

The rule as to the function of the courts in such cases is well summed up in *Lockard v. City of Los Angeles,* 33 Cal.2d 453, 461-62: "The duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts, and under the doctrine of separation of powers neither the trial nor appellate courts are authorized to 'review' legislative determinations. The only function of the courts is to determine whether the exercise of legislative power has exceeded constitutional limitations."

Appellant complains that the trial court "did not find on any of the basic facts relating to the issue," and refers particularly to paragraphs 42 to 47 of its proposed Findings of Fact and Conclusions of Law. In our opinion, the trial court did not err in declining to adopt appellant's proposed findings and did not limit itself to conclusions of law. Although appellant availed itself of the right to submit "counterfindings" which were not adopted by the court, it did not make any written request for special findings as contemplated by Code Civil Procedure, section 634. The proposed "counterfindings" relate primarily to evidentiary matters. The court made extensive findings as to all material facts relating to the issues. In the absence of a written request for special findings "as provided in section 634, a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made." (*Auer v. Frank*, 227 Cal.App.2d 396, 406; *Ellis v. Community Chevrolet Co.*, 242 A.C.A. 72.)

The trial court expressly found that the ordinance is not arbitrary or unreasonable, and that "its adoption is a matter over which reasonable minds might differ." It also found that the application of the ordinance to the subject property does not deprive the owner "of the entire use or entire economic benefit of its property and is not discriminatory or confiscatory." These findings are supported by substantial evidence. The findings as a whole support the conclusion of the trial court that the ordinance is a valid exercise of the police power and is constitutional. We agree with that conclusion.

The Court's Failure to Make Certain Findings

In the findings signed and filed December 31, 1965, the court found "that in view of the lack of easements for sewer and storm drain purposes through properties below petitioner's property, any development for R-1-H purposes would not have been very different from the point of view of grading than the development undertaken by petitioner." When the court denied Spindler's motions for judgment n.o.v. and for a new trial the court struck from the findings the langauge just quoted pursuant to Code Civil Procedure, section 662, stating that the findings of fact and conclusions of law and judgment previously entered "stand unaffected thereby." Spindler now contends that by striking this language from the findings and by failing to make any finding to the effect that the grading it had done on the property was not usable to develop the property for R-1 purposes, was prejudicial error.

The change in the findings effected by the court and its failure to adopt paragraphs 32 and 33 of Spindler's proposed findings of fact was not error. The record does not show that Spindler made any written request for specific findings in accord with those paragraphs of its proposed counterfindings, either before the entry of the judgment or in conjunction with its motion under section 663 of the Code of Civil Procedure. As we have noted above, the submission of proposed counterfindings does not serve this purpose. We are satisfied that the trial court made specific findings on all the issues and as to all facts necessary to support the judgment.

Errors of Law

Spindler contends that in four instances the trial court erroneously struck out certain testimony and rejected its offer of proof: First, with reference to the testimony of the superintendent of grading for the City to establish knowledge on the part of the City that grading for R-5 development was not suitable for R-1 development; second, the testimony of the Principal City Planner relating to the issue of whether the grading for R-5 development constituted a protectable nonconforming use; third, the testimony of Spindler's zoning expert as to what constitutes a nonconforming use protectable under the Municipal Code; and *fourth,* the testimony of the same expert to the effect that the change in zone effected by the ordinance of March 8, 1962, was confiscatory, arbitrary and unreasonable.

In view of what we have said above on the principal issues in the case, there was no error in these rulings.

The judgments appealed from are affirmed. The purported appeals from the orders denying the motions of petitioner and plaintiff to vacate and set aside the judgment and to enter new and different judgments are dismissed.

McCoy, *J. Pro Tem.**

We concur.

Herndon, Acting *P. J.*

Fleming, *J.*

*Under assignment by the Chairman of the Judicial Council.

APPENDIX "B".

Order of the District Court of Appeal, Second Appellate District, State of California, Modifying Opinion and Denying Rehearing.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Spindler Realty Corporation, a corporation, Petitioner and Appellant, v. John C. Monning, as General Manager, etc., Respondent.

Spindler Realty Corporation, a corporation, Plaintiff and Appellant, v. City of Los Angeles, Defendant and Respondent. 2nd Civ. No. 29616.

Filed:

Order Modifying Opinion and Denying Petition for Rehearing.

By the Court:

The opinion of the court filed June 29, 1966, is modified as follows:

1. On page 4 of the ditto copy of the opinion the sentence beginning on line 8 with the words, "Later Spindler filed the required bond," is deleted and the following is inserted in lieu thereof: "Later Spindler filed the required bond of $275,000 conditioned on its faithful compliance with the terms and conditions of the grading permit. The City also granted Spindler's application for a class "B" permit, permitting Spindler to grade in the City's right of way."

2. On page 25 of the ditto copy that part of the full paragraph beginning with the words, "Although appellant availed itself of the right . . ." to the end of the

paragraph is deleted and the following is inserted in lieu thereof:

This action was tried before the Honorable Otto M. Kaus, then a Judge of the Superior Court, sitting without a jury. Shortly before the conclusion of the evidence, Judge Kaus had been appointed a Justice of the District Court of Appeal and had advised counsel that he desired to take his oath on December 31, 1964. On December 23, 1964, Judge Kaus announced his decision in favor of the City, saying in part: "On the disputed facts I have jotted down some things I feel I ought to find on but there will undoubtedly be others and I want you to feel free to request specific findings of fact, because, as I have indicated to you, I feel the matter ought to be honestly and fairly before the Appellate Court." After stating some of the matters on which findings should be made, Judge Kaus said: "Now, I don't know whether anything more specific ought to be found as to that. If so, I will gladly listen to suggestions." The minute order for that day reads in part: "The Court finds for the City. Findings ordered."

Counsel again appeared before Judge Kaus on December 31, 1964, "for the purpose of settling the findings, conclusions and judgment in this matter." At that time counsel stipulated on the record "to a waiver by both sides of any time requirements with respect to the service or signing by the Court for findings and conclusions of law," that is, "the ten-day time limitation of CCP, 634," but not any other rights the parties might have "in the action of the execution and the findings and the judgment." They then stipulated that Spindler "may lodge with the Court this day its proposed findings of fact and conclusions of law in action No. 798,-

477 and that he may be deemed to have objected to any departure from such proposed findings of fact and conclusions of law found in the actual findings of fact and conclusions of law made by the Court in action No. 798,477 and action No. 799,416, and that the Court may make a Minute Order thereon and that the Minute Order together with the proposed findings of fact and conclusions of law become a part of the record." They also stipulated that the City could file with the court its objections to Spindler's proposed findings as well as its own proposed findings, "with the understanding that what you are now to lodge with the court was before the court at the time when we discussed your proposed findings, Mr. Brannen's proposed findings and worked both of them over extensively." The minute order of that day reads, in part, "that the record of certain stipulations, with the minute order, be and hereby is made a part of the record, together with the proposed Findings lodged with the Court by the plaintiff and petitioner and those to be lodged by defendant and respondent."

It is apparent from the record that the court did not direct either party to prepare findings as it might have done under Code Civil Procedure, section 634. Instead, as permitted by that section, both parties served and lodged with the court their proposed findings, and by their stipulations waived the time limits of that section with respect to the signing of findings and reserved their rights as to any objections each might have to the findings thus proposed by the other. The proposed findings thus submitted by Spindler cannot be considered as "requests for special findings" under any reasonable interpretation of that section. "Parties have the right to request the trial judge to adopt certain findings

of fact and conclusions of law. However, the trial judge is not bound to accept the proffered findings of fact and conclusions of law. He may do so *in toto,* in part, or disregard such proposed findings and conclusions in their entirety. The findings of fact and conclusions of law are those of the trial court and proposed findings are merely an aid and assistance to the court in preparing *its* findings of fact and conclusions of law." (*Howard v. Howard,* 119 Cal.App.2d 122, 124.)

Section 634, Code Civil Procedure was amended in 1959, providing for "requests for special findings" and "a written request for a specific finding" on some particular issue. (Stats. 1959, ch. 637, p. 2614.) "The purpose of the legislation was to compel trial judges to make findings on all material issues of fact." (*Calloway v. Downie,* 195 Cal.App.2d 348, 353.) The section still provides, however, for the service of "proposed findings," "objections [and] counterfindings" in all cases where findings are to be made. *Bilger v. Bilger,* 54 Cal. App.2d 739, 743, on which Spindler relies, is not in point here, since that case was decided before the 1959 amendment to section 634.

Section 634, Code Civil Procedure, provides that a request for a specific finding may be made in conjunction with a motion under section 663 for another and different judgment. The findings of fact and conclusions of law and the judgments in these actions were signed and filed December 31, 1964. Spindler's notice of motion under section 663, filed January 16, 1965, states that the motion would be made on the grounds of "incorrect and erroneous conclusions of law not consistent with and not supported by Findings of Fact." We find nothing in this notice of motion which can be construed as a

request for a special or specific finding in accordance with paragraphs 42 to 47 of Spindler's proposed findings of fact (cf. *Auer v. Frank,* 227 Cal.App.2d 396, 406-07), nor is there any written request for special or specific findings in the record.

The court made extensive findings as to all material facts necessary to support the judgments. In the absence of a written request for a specific finding "as provided in section 634, a judgment will not be set aside on appeal because of a failure to make a express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made." (*Auer v. Frank, supra,* at 406; *Ellis v. Community* Chevrolet, Inc., 242 Cal.App. 2d .....*)

3. On page 26 of the ditto copy of the opinion the words in the tenth line from the bottom reading, "for judgment n.o.v." are deleted and the words, "for another and different judgment (Code Civ. Proc., § 663)," are inserted in lieu thereof.

Appellant's petition for a rehearing is denied.

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*Advance Report Citation: 242 A.C.A. 72.

APPENDIX "C".

Judgment of the District Court of Appeal, Second Appellate District, State of California.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

Spindler Realty Corporation, a corporation, Petitioner and Appellant, vs. John C. Monning, as General Manager, etc., Respondent.

Spindler Realty Corporation, a corporation, Plaintiff and Appellant, vs. City of Los Angeles, Defendant and Respondent. 2nd Civ. No. 29616.

(June 29, 1966).

The judgments appealed from are affirmed. The purported appeals from the orders denying the motions of petitioner and plaintiff to vacate and set aside the judgment and to enter new and different judgments are dismissed.

McCoy, *J. Pro Tem.**

We concur.

Herndon, Acting *P. J.*

Fleming, *J.*

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*Under assignment by the Chairman of the Judicial Council.

APPENDIX "D".

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the Fifth Amendment to the Constitution of the United States are:

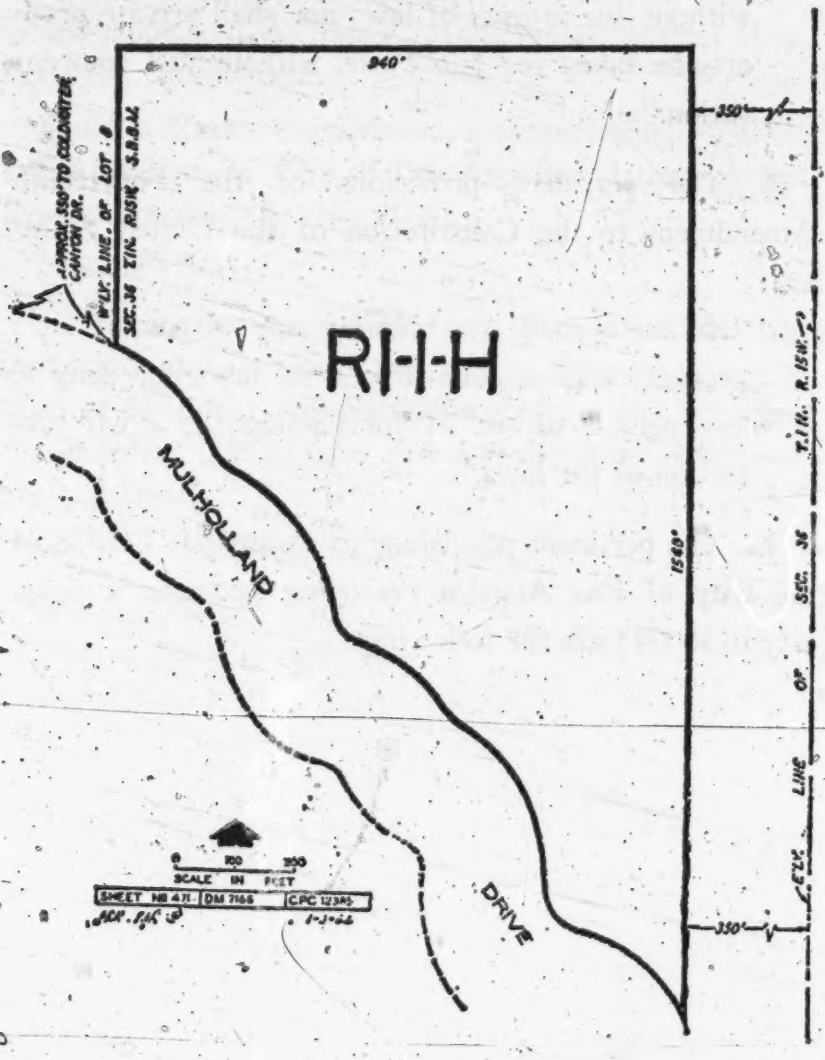
> "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States are:

> "No state shall . . . deprive any person of . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The pertinent provisions of Ordinance 121338 of the City of Los Angeles (rezoning petitioner's property to R-1H) are the following:

"Section 1. Section 12.04 of the Los Angeles Municipal Code is hereby amended by changing the zones and zone boundaries shown upon a portion of the Zone Map attached thereto and made a part of Article 2, Chapter 1, of the Los Angeles Municipal Code, so that such portion of the Zoning Map shall be as follows:



4. The pertinent provisions of Ordinance 116389 of the City of Los Angeles (creating zone R-1H) are the following:

"In order to more effectively carry out the purposes of the Comprehensive Zoning Plan, as set forth in Section 12.02 of this Article, and more particularly to adequately control and regulate the extent and intensity of grading and construction, prevent undue concentration of population, lessen congestion on streets, prevent and fight fires, facilitate adequate provisions for water supply, sewerage and drainage facilities in certain hillside and mountainous areas of the City of Los Angeles, certain portions of the R I One-Family Zone are also established as being in an 'H' Hillside or Mountainous Area. The boundaries of said Hillside or Mountainous Areas are shown by the use of the symbol 'H' in conjunction with the symbol 'R1' on portions of the 'Zoning Map.'

* * *

"Provided, further, that every lot which is located within the R1 Zone and also within a Hillside or Mountainous Area shall have a minimum area of 15,000 square feet and the minimum lot area per dwelling unit within said area also shall be 15,000 square feet, except that there may be lots with an area of less than 15,000 square feet and there may be a single-family dwelling on each such lot if the lot is shown with a separate and distinct letter or lot number on a recorded subdivision tract map, the tentative tract map of which was approved subsequent to the effective date of this ordinance. No lot in such a subdivision shall be separate in own-

ership or reduced in size unless such separation in ownership or reduction in size is accomplished by the recording of a new subdivision tract map. Any lot which has an area or less than 15,000 square feet and was held under separate ownership or was of record or was shown on a recorded tract map, the tentative tract map of which was approved prior to the effective date of this ordinance, may be occupied by any use permitted in this section."

5. The pertinent provisions of Section 12.12 of the Los Angeles Municipal Code (establishing zone R-5) are the following:

"SEC. 12.12—'R5' MULTIPLE DWELLING ZONE:

The following regulations shall apply in the 'R5' Multiple Dwelling Zone:

* * * *

2. Hotels or apartment hotels (including guest cottages), in which incidental business may be conducted, but only as a service to persons living therein, and provided such business is conducted within the main building, the entrance to the business is from the inside of the building, and no sign advertising such business is visible from outside the building."

6. The pertinent provisions of Section 12.23C of the Los Angeles Municipal Code (protecting non-conforming uses) are the following:

"C. Nonconforming Use of Land

1. Continuation—Limitation

(a) The nonconforming use of land shall be discontinued within five years from June 1, 1946, or within five years from the date the use became nonconforming, in each of the following cases: (1) where no buildings are employed in connection with such use; (2) where the only buildings employed are accessory or incidental to such use; (3) where such use is maintained in connection with a conforming building.

(b) A nonconforming use of land which is accessory or incidental to the nonconforming use of a nonconforming building, shall be discontinued on the same date the nonconforming use of the building is discontinued.

(c) Except as provided in paragraphs (a) and (b) above, the nonconforming use of land may be continued, but shall be subject to the following limitations: (1) such use shall not be expanded or extended in any way either on the same or adjoining land; (2) such use shall not be changed, except to a use which conforms to the regulations of the zone in which such land is located; and (3) if such use is discontinued it shall not thereafter be reestablished."

7. The pertinent provisions of Section 12.03 of the Los Angeles Municipal Code (defining the expressions "use" and "nonconforming use") are the following:

"For the purpose of Article 2 to 6 inclusive of this chapter certain terms and words are herewith defined as follows:

* * * *

"Nonconforming Use—A use of a building or land which does not conform to the regulations of this Chapter and which lawfully existed at the time the regulations, with which it does not conform, became effective.

* * *

Use—The purpose for which land or a building is arranged, designed or intended or for which either land or a building is or may be occupied or maintained."

APPENDIX "E":

Map 11 of Master Plan, Santa Monica Mountain Area (Map 11 of Defendant's Exhibit EEE).

A PORTION OF

RESIDENTIAL & COMMERCIAL

EXISTING & PROPOSED	PERSONS PER ACRE	DWELLING UNITS PER ACRE
	5 OR LESS	1.0
	5 – 10	2.5
	10 – 20	5.0
	20 – 30	8.0
	30 – 100	21.0
	100 – 200	50.0
	COMMERCIAL & PARKING	

VICINITY MAP

SCALE IN FEET 0 2000 4000 8000 10000 12000

SCALE IN MILES 0 1 2

CITY PLAN CASE NO. 9708

APPROVED BY THE PLANNING COMMISSION JUNE 25 1964

APPROVED BY CITY COUNCIL JULY 30 1964

APRIL 1964, MARCH 1965

CITY PLANNING COMMISSION – LOS ANGELES CALIFORNIA 1964

GENERAL PLAN

SANTA MONICA MOUNTAIN AREA

OF THE MASTER PLAN OF THE CITY OF LOS ANGELES

PUBLIC & QUASI PUBLIC

EXISTING	PROPOSED	
		ELEMENTARY SCHOOL
		JUNIOR HIGH SCHOOL
		SENIOR HIGH SCHOOL
		WATER & POWER PROPERTY (TANK, RESERVOIR)
	F	OTHER PUBLIC FACILITIES (F-FIRE, P-POLICE, L-LIBRARY)
		HELISTOP - FIRE DEPT FACIL.
		PRIVATE SCHOOLS & INSTITUTIONS
		CEMETERY

RECREATION - PARKS

EXISTING	PROPOSED	
		PARKS (REGIONAL, DISTRICT, NEIGHBORHOOD)
		SCENIC DEVELOPMENT FEATURE
		RECLAMATION SITE
		RECREATION - QUASI PUBLIC

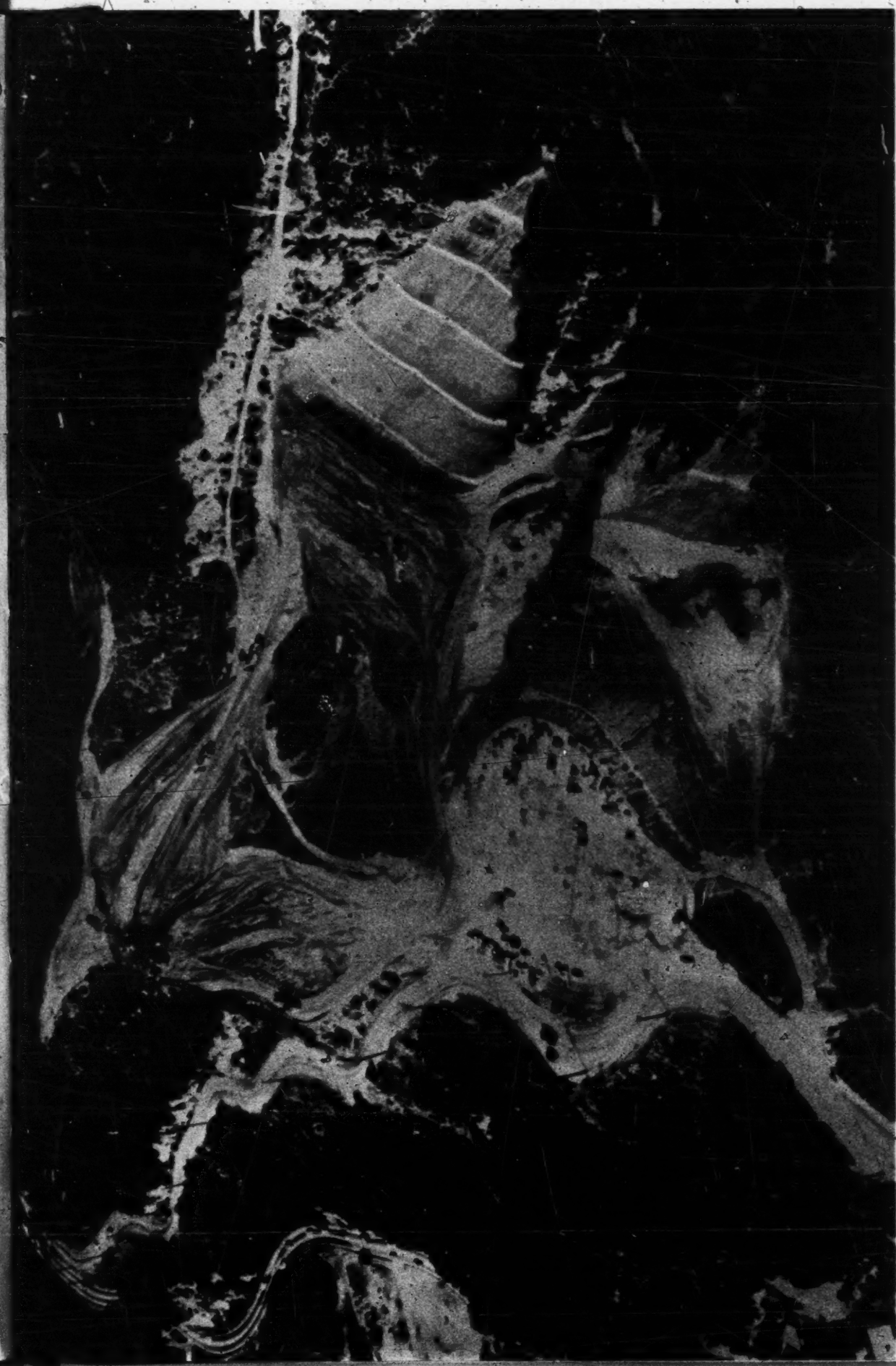
CIRCULATION

	FREEWAY OR EXPRESSWAY
	MAJOR OR SECONDARY HIGHWAY
	MINOR TRAFFIC OR HILLSIDE COLLECTOR STREET

(Property of Spindler Realty Corporation) — (Zone R-1 H)

APPENDIX "F".

Photograph of the Unfinished Work, Being Plaintiff's Exhibit 32-G.



SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1966
No. .....

SPINDLER REALTY CORPORATION, a corporation,
Petitioner and Appellant,

vs.

JOHN C. MONNING, as General Manager and Superintendent of Building and Safety of the City of Los Angeles,
Respondent and Appellee,

SPINDLER REALTY CORPORATION,
Plaintiff,

vs.

CITY OF LOS ANGELES,
Defendant and Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal, Second Appellate District, of the State of California.

Spindler Realty Corporation has petitioned this Honorable Court for a Writ of Certiorari directed to the District Court of Appeal, Second Appellate District, of the State of California to review the decision of that court in the above-entitled matter. It is submitted that for the reasons hereinafter set forth the petition should be denied.

I.

The Petition for Writ of Certiorari Herein Should Be Denied for Failure of Petitioner to Comply With Rules 21 and 23 of This Honorable Court.

Rule 21 of the Revised Rules of the Supreme Court of the United States in paragraph 1 thereof provides in part:

"Review on Writ of Certiorari shall be sought by filing with the clerk . . . forty printed copies of a petition, *which shall conform in all respects to Rule 23* . . ." (Emphasis added).

Rule 23 of such Revised Rules provides in the first paragraph of paragraph 1(f) thereof as follows:

"If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

It is submitted that the Petition for Writ of Certiorari herein is wholly devoid of *any* specification of where or how in the trial and appellate courts the federal questions sought to be reviewed herein were raised or how they were passed upon by those courts; that no quotation from the record is presented nor is reference thereto made so as to show that such federal questions were timely or properly raised; that such omissions im-

pose an onerous burden upon this Honorable Court and upon respondents herein in the consideration of this petition; and that for such reasons alone the petition herein should be denied.

II.

The Issues.

Both in its opening statement to the trial court [R.T. p. 3, line 15, to p. 5, line 13] and its opening brief to the District Court of Appeal (p. 12) petitioner herein urged three basic contentions in support of its position:

1. That the ordinance changing the zone from R5 to R1-H "was oppressive, discriminatory and bore no reasonable relation to the public welfare or safety and was unconstitutional on that ground."

2. That appellant had a vested right to receive a building permit for its apartment project and to build and maintain same notwithstanding the fact that the zone had been changed to permit only single family dwellings.

3. That appellant had an existing nonconforming use on the site for an apartment project and hence a right to be issued permits for and to erect and maintain same.

The District Court of Appeal in its opinion herein specifically recognized, discussed and rejected those three contentions (243 A.C.A. 260, 267, 268; Appendix "A" to Petition for Writ of Certiorari, p. 7).

The petition herein now sets forth *five* "Questions Presented" (pp. 2 and 3), which are basically simply an elaboration upon questions 1 and 2, above, and has

apparently abandoned its 3rd above set forth question (footnote number 1, p. 3 of petition herein).

Some comment must be made, however, upon the misleading language used in some of the five "Questions Presented" posed by petitioner at pages 2 and 3 of the present petition.

In Question No. 2 petitioner poses the question of whether "the City of Los Angeles can constitutionally prevent petitioner from building on" the subject property. The City of Los Angeles has never and does not now contend that petitioner cannot build on the subject property. It simply contends that petitioner like anyone else must build in conformity with the applicable zoning.

In Question No. 4 (a) petitioner asserts the *factual* premise that "the number of dwelling units per acre authorized by that zoning cannot physically be created, on the property." Suffice it to say that neither the trial court nor the District Court of Appeal ever passed upon such point, nor was such a contention ever even made in the lower courts. Raising such a point at this late stage in the proceedings, even assuming that it involved a federal constitutional question at all, does not suffice to open such question to review in the United States Supreme Court (*Radio Station WOW v. Johnson,* 326 U.S. 120, 65 S. Ct. 1475, 87 L. Ed. 2092; *Herndon v. State of Georgia,* 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530).

In Question No. 4 (b) petitioner asserts the *factual* premise that "the density requirements (i.e., the authorized number of dwelling units per acre) made applicable to petitioner's property are not applicable to any

other property, in the City, in that zone." Such is just plain not true. The authorized number of dwelling units per acre is based upon the applicable *zoning* of the property. The trial court specifically found in Finding of Fact 45 [C.T. p. 86, lines 16 to 19] that "The rezoning of the subject property from R5 to RI-H by Ordinance No. 121,338 was consistent with Ordinance No. 116,389, *establishing the R1-H zone and rezoning all of the property adjacent to and surrounding the subject property;* is consistent and compatible with the existing zoning, land use and development of all of such adjacent and surrounding property; . . ." (Emphasis added). It is thus apparent that the zoning density applicable to petitioner's property was the same as for all the adjacent and surrounding property.

To the extent that petitioner's claims of denial to it of certain federal constitutional rights were based upon its own erroneous assumptions of the facts involved, such claims are without merit and afford no basis for review by the United States Supreme Court (*Parker v. McLain,* 237 U.S. 469, 35 S. Ct. 632, 59 L. Ed. 1051).

It is submitted that the basic questions involved herein are simply (1) the validity of the rezoning of the subject property from R5 to R1-H, and (2) whether petitioner herein had a vested right to receive building permits for an apartment project on the subject property in conflict with the existing single family zoning thereof by reason of the fact that it had commenced grading such site for no specified purpose and in connection with no particular project prior to the enactment of such zoning.

III.

The "Statement" of the Case Set Forth in the Petition Is Misleading in Its Omissions and Misstatements and Thereby Constitutes Adequate Basis for Its Denial.

The pertinent facts of this case are neatly and succinctly set forth in the opinion of the California District Court of Appeal (Appendix "A" to the Petition for Writ of Certiorari herein) and the following comments are based thereon unless otherwise specifically set forth.

Petitioner first states (Pet. p. 4) that the "basic facts are not in dispute" and in support thereof in footnote 2 refers to Findings 1 to 41 of the trial court. It makes no mention of Findings 42 to 47 [C.T. p. 86, line 1, to p. 87, line 9] as being part of such "basic facts" when in truth they are the basic ultimate determinations of the trial court in answer to petitioner's contentions herein.

Petitioner next states (Pet. p. 4) that it had "spent the sum of $522,541.55 to grade and otherwise develop its real property for multiple housing (zone R-5) purposes." It *fails* to make clear, however, that this money was spent over a fourteen year period for a series of projects which it voluntarily abandoned or never fully formulated right up to the end of such expenditures.

Petitioner next states (Pet. p. 4) that it had "been induced to make these expenditures by reason of a long series of City permits and like authorizations, including a grading permit." Such permits and authorizations

consisted of the rezoning of the property as R5 in 1948 in proceedings wherein petitioner had expressed its intention to erect a small 150 room hotel on the site [R.T. p. 566, line 24, to p. 568, line 7]; of the grant of conditional use to petitioner in 1956 to conduct incidental business and recreational facilities in conjunction with a 150 room hotel [R.T. p. 2127, line 22, to p. 2128, line 7]; of annual extensions of time to commence use of such conditional use hotel privilege to December 4, 1961; and of the issuance of a grading permit for the site "without reference to any particular proposed use of the property as to the number, size or type of buildings to be erected on the site" (Opinion of District Court of Appeal, Appendix "A" to Pet. p. 3). It seems obvious that petitioner could not have been induced by such city actions relating to a hotel project or to no specified project at all to expend some or any money toward the erection of its now sought 1,040 unit high-rise apartment complex.

Petitioner next states (Pet. p. 4) that "An application for a building permit was filed, together with building plans, before the enactment of the rezoning statute. As proceedings to rezone were pending, a building permit was never granted." Such statement is untrue. Petitioner carefully *fails* to mention that the only plans filed by it *prior* to the enactment of the zone change "were inadequate for plan checking . . . and petitioner . . . requested the Department of Building and Safety not to check them, but to wait for new or additional plans to be filed" [Find. of Fact 23; C.T.

p. 79, lines 4-12]. Petitioner further fails to mention that the new plans filed March 27, 1962, some three weeks *after* the enactment of the rezoning ordinance, required a series of corrections which it was stipulated could have been made after June 1, 1962 and further that petitioner was specifically advised by the city that such project was prohibited by the existing zoning, *not* by "pending" zone change proceedings [Find. of Fact 24; C.T. p. 79, line 26, to p. 80, line 8].

Petitioner next states (Pet. p. 4) that "The Trial Court found that petitioner had a 'vested right' to complete the grading of the building site for an R5 purpose." The trial court in *fact* found [Find. of Fact 22; C.T. p. 78, lines 29 and 30] only that "petitioner had acquired a vested right to complete the grading under the grading permit issued to it" and no mention was made by the trial court of a vested right to grade "for an R5 purpose."

Petitioner next states (Pet. p. 6) that "The density (or number of dwelling units authorized) for property zoned in R1-H was 2½ units per acre (Appx. 'E'). The density authorized for petitioner's property was twice that, or 5 units per acre (*Ibid.*)." The first statement is true. The second is not. R1-H zoning which is applicable to petitioner's property and to "all of the property adjacent to and surrounding" same [Find. of Fact 45] requires lots of a minimum of 15,000 square feet which, after deducting streets necessary to a residential development, results in approximately 2½ lots (or dwelling units) per acre. Appendix

"E", however, to which petitioner refers in support of its allegation that it is "authorized" to have *twice* the R1-H density or 5 units per acre in fact gives no such authority. Appendix "E" as is clearly shown thereon is not a zoning map at all. It is the "General Plan" for all of the Santa Monica Mountains consisting of some 92 square miles. It is simply a *guide* to future zoning and shows only the possible *future* permitted density of the subject property at 5 units per acre. (It is to be noted that even a 5 unit per acre density is a far cry from the 1,040 units which petitioner seeks to place on its 21 acres, or roughly *50* units per acre).

Finally, petitioner states (Pet. p. 6) that "The statute was not a general zoning ordinance of broad application but was 'spot zoning' applicable to petitioner's property only." Although it is true that Ordinance No. 121,338 did rezone petitioner's 21 acres to R1-H, it is to be noted that such rezoning simply brought petitioner's property into line with and placed it in the same zone as "all of the property adjacent to and surrounding the subject property" [Find. of Fact 45] and hence, if anything, simply corrected and wiped out the "spot" zoning which originally had been granted to petitioner in 1948.

It is submitted that to the extent that petitioner has failed to accurately state the facts involved herein such constitutes "a sufficient reason for denying his (its) petition." (Rule 23, paragraph 4 of the Revised Rules of the Supreme Court of the United States).

IV.

No Special or Important Reason Exists for the Issuance of the Writ Requested Herein.

Although petitioner only specifically mentions the 5th and 14th amendments to the federal constitution in connection with its first question (Pet. p. 2), makes passing mention of *some* constitution in connection with its second question (Pet. p. 2) and makes *no* mention at all of a constitutional question in connection with its third, fourth and fifth questions (Pet. p. 3), we must assume that it is urging in support of each of its contentions that its property has been taken without due process of law in violation of the federal constitution. It is submitted that the law is now clear and firmly established that property has not been "taken" by the reasonable zoning thereof or by the denial of building permits for a use not in conformity with such zoning. (*Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303; *Zahn v. Board of Public Works*, 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074; *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348).

This court has further clearly held that where the question as to the propriety of the zoning is "fairly debatable . . . the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." (*Zahn v. Board of Public Works, supra*, 274 U.S. 325, 328; *Euclid v. Ambler Realty Co., supra*, 272 U.S. 365, 388; *Sproles v. Binford*, 286 U.S. 374, 388, 52 S. Ct. 581, 76 L. Ed. 1167; *Radice v. New York*, 264 U.S. 292, 294, 44 S. Ct. 325, 68 L. Ed. 690). This principle has been

echoed and followed by state courts throughout the nation in hundreds of zoning decisions, including decisions of the California courts (*Lockard v. City of Los Angeles,* 33 Cal. 2d 453, 461, 202 P. 2d 38, petition for writ of certiorari to the Supreme Court of California denied—337 U.S. 939, 69 S. Ct. 1516, 93 L. Ed. 1744; *Miller v. Board of Public Works,* 195 Cal. 477, 490, 234 Pac. 381, appeal dismissed—273 U.S. 781, 47 S. Ct. 460, 71 L. Ed. 889; *Robinson v. City of Los Angeles,* 146 Cal. App. 2d 810, 815, 304 P. 2d 814; *Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal. 2d 515, 522, 523, 370 P. 2d 342, appeal dismissed—371 U.S. 36, 83 S. Ct. 145, 9 L. Ed. 2d 112).

With these principles in mind this court's attention is directed to the specific findings of the trial court herein that the rezoning of the subject property to R1-H was consistent with the earlier ordinance "establishing the R1-H zone and rezoning all of the property adjacent to and surrounding the subject property; is consistent and compatible with the existing zoning, land use and development of all of such adjacent and surrounding property; and is rationally connected with maintaining a limited density of development for the entire area . . ." [C.T. p. 86, lines 16-23]; that the rezoning of the subject property "bears a substantial relationship to the accomplishment of a proper public purpose under the police power, and is not arbitrary or unreasonable. Its adoption is a matter over which reasonable minds might differ." [C.T. p. 86, lines 29-32]; that the application of the R1-H zone to the "subject property does not deprive petitioner or plaintiff of the entire use or entire economic benefit of its property and is not discriminatory or confiscatory. On

the contrary, said ordinance is reasonable in object and not arbitrary in operation." [C.T. p. 87, lines 1-6.]

It is submitted that there was ample evidence in the record to support the above findings and that the above findings fully support the determination of the California courts upholding the validity of the zoning in question.

With respect to petitioner's contention that it had commenced grading its property prior to the enactment of the zone change ordinance and thereby had secured to itself a "vested right" to proceed with its apartment complex, suffice it to say that no case of this or any other court to which petitioner cites us so holds. As the California District Court of Appeal pointed out, the grading permit was issued "without reference to any particular proposed use of the property as to the number, size or type of buildings to be erected on the site." (Appendix "A" to petition, p. 3). Petitioner itself wasn't sure of just what it wanted to erect on the site as evidenced by the fact that the project encompassed by its plans submitted 3 weeks *after* the enactment of the rezoning ordinance substantially differed from the plans submitted 2 weeks previous thereto [R.T. p. 2336, line 1, to p. 2338, line 14]. Are we to understand petitioner's contention to be that by commencing grading it had somehow secured to itself a "vested right" to construct on the premises whatsoever it *subsequently* chose to erect, completely apart from the limitations of an intervening change of zone? We submit that the lower courts correctly decided that petitioner had no such right, but had only a vested right to complete its grading, if it so wished, for which

it had submitted specific plans and had obtained a permit and commenced preliminary operations. (Appendix "A" to Pet. p. 10). It is submitted that the law on this point is correctly set forth in *Anderson v. City Council,* 229 Cal. App. 2d 79, 40 Cal. Rptr. 41, wherein the court stated at pages 89 and 90:

> "Where a building permit to erect a specific type of building is issued by a county or city and the permitee acts upon it and incurs obligations, or in good faith commences construction, his rights become vested and the governmental body is thereafter estopped to set up a zoning ordinance subsequently enacted. (citation) Where no such permit has been issued, it is difficult to conceive of any basis for such estoppel. . . . These authorities (citations) establish the rule that respondents did not acquire a vested right, as against future zoning, merely by purchasing the property in reliance on the existing zoning and thereafter making certain endeavors to develop it for a specified use."

To the same effect, see also *Brougher v. Board of Public Works,* 205 Cal. 426, 434, 271 Pac. 487; *Price v. Schwafel,* 92 Cal. App. 2d 77, 82-85, 206 P. 2d 683.

Moreover, the mere fact that petitioner has expended money in reliance upon the previously existing zoning or has suffered a reduction in value of the property as a result of such rezoning, although regrettable, does not suffice to invalidate such rezoning. Thus in *Hadacheck v. Sebastian, supra,* the rezoning of the subject property so as to preclude an operating brick yard, was upheld notwithstanding the fact that ex-

tensive excavations in connection with brickmaking had occurred thereon and that the property would be reduced in value from approximately $800,000 to $60,000. Similarly, in *Consolidated Rock Products Co. v. City of Los Angeles, supra,* the California Supreme Court at pages 531 and 532 of 57 Cal. 2d quoted with approval from *West Bros. Brick Co. v. City of Alexandria,* 169 Va. 271, 192 S.E. 881 (appeal dismissed—302 U.S. 658, 85 S.Ct. 369, 82 L.Ed. 508) wherein a rezoning ordinance was upheld, stating in referring to zoning ordinances:

> "General rules applicable thereto are now well settled. They must not be wholly unreasonable, but they are presumed to be valid and to have been promulgated by those familiar with local conditions. Vested interests will not defeat them, and of course constitutional rights are not to be measured in terms of money. That, however, is a consideration to be remembered. Great financial losses should not be inflicted where benefits to others are negligible, but public welfare and public convenience do control and are in themselves terms constantly adjusted to meet new conditions. Upon those who would set aside such ordinances rests a heavy burden of proof. They stand when their validity is debatable."

Similarly in *Marblehead Land Co. v. City of Los Angeles,* 47 F. 2d 528, certiorari denied—284 U.S. 634, 52 S. Ct. 18, 76 L. Ed. 540, the rezoning of the subject property so as to preclude oil drilling was upheld notwithstanding the fact that plaintiff Standard Oil Co. had leased the property and paid $65,000 therefor and had additional expended $136,000 toward oil drilling operations in reliance on the existing zoning.

Conclusion.

It is submitted that for the reasons above set forth the petition for writ of certiorari herein should be denied.

Respectfully submitted,

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